MOTION FILED
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NO. 85-899

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF CONNECTICUT,
*Petitioner,*

V.

WILLIAM BARRETT,
*Respondent.*

On Writ of Certiorari to the
Supreme Court of the State of Connecticut

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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## MOTION FOR LEAVE TO FILE BRIEF OF AN AMICUS CURIAE

The National District Attorneys Association ("NDAA") respectfully moves for leave to file the attached brief as amicus curiae. In support of its Motion, NDAA would show the court as follows:

1. *Interest of Amicus Curiae.* NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

2. *Specific Interest in the Case at Bar.* NDAA's members are continuously engaged in the litigation of criminal cases, including many cases presenting issues related to those in the case at bar. They would be affected directly in their statutory obligations if the reasoning of the court below were to be adopted here. Since NDAA's members appear in the trial courts to represent the states in these cases, NDAA may be able to assist the Court in developing the issues fully.

3. *Purpose of Amicus Curiae Brief.* NDAA's purpose, in this brief, is to analyze the case authority in ways that are not present in other briefs. Amicus curiae has communicated with counsel for Petitioner in an effort to avoid undue duplication. It is believed that this brief argues the issues in a manner that will not be done in Petitioner's brief.

4. *Public Importance of the Issues Addressed Here.* Since its decision in *Edwards v. Arizona,* this Court has addressed the issues it raised in several cases. A very large number of cases has been presented to the lower courts. The results have sometimes been anomalous. The decision of the Connecticut Supreme Court in this case is an example. There is great need of a clarification of the *Edwards* standard to avoid these anomalous results.

5. *Requests for Consent.* The consent of the Petitioner to the filing of this brief has been requested and granted. The consent of Respondent has been requested and refused. This Motion is therefore filed in accordance with the Rules of this Court.

FOR THESE REASONS, NDAA prays that it be granted leave to file the attached brief as amicus curiae.

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# BRIEF OF AMICUS CURIAE

## INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is set forth in paragraphs 1-2 of the Motion preceding this brief.

## SUMMARY OF ARGUMENT

The opinion below holds that a criminal suspect's reply to police that he would not give a written statement without his attorney present, but that he was willing to answer questions orally, amounts to a request to have counsel present during subsequent oral discussions. Neither the Fifth and Fourteenth Amendments to the United States Constitution nor the decisions of this Court that were relied on by the Connecticut Supreme Court support such a conclusion. As is evident from the record, respondent Barrett, who was fully advised of his *Miranda* rights, never indicated in any manner that he wished to remain silent, nor did he state that he wanted an attorney present while talking with police. To the contrary, it could not be more clear that respondent clearly was eager to discuss the matter under investigation and was wholly willing to do so without any attorney

present. Respondent never having invoked his right to counsel, the only relevant inquiry is whether he voluntarily, knowingly, and intelligently waived the rights conveyed in the *Miranda* warnings. The record amply confirms the finding of the trial court that the waiver was validly made.

## ARGUMENT AND AUTHORITIES

### I. RESPONDENT NEVER INVOKED HIS RIGHT TO REMAIN SILENT OR TO HAVE COUNSEL PRESENT DURING DISCUSSIONS.

*A. The plain sense of respondent's words conveys a waiver of the right to remain silent and the right to counsel.*

Quite simply, respondent told police that he would not give them a written statement without an attorney present, but he had "no problem" in talking about the matter in question. Had the police proceeded to extract a written statement from respondent, there might be some serious question about whether such statement were admissible. No such written statement was ever obtained, however, and therefore no such question arises.

The record contains no indication, and the court below nowhere suggests, that respondent was laboring under the impression that oral statements were any less admissible in criminal proceedings than written statements. Indeed, prior to the first interview with the Wallingford police, respondent had been advised of his *Miranda* rights *on three separate occasions.* At least twice, he had acknowledged that he understood those rights and had signed a printed form setting them forth. Among the rights that were read to and acknowledged by respondent, of course, was the "right to *remain silent*" with the concomitant warning that "if you *talk* to any police officers, anything you *say* can and will be used against you in court." Also among those rights were the rights to consult with a lawyer and to "have him with you *during questioning,*" and the right to have a lawyer appointed for free "before any *questions.*" (emphasis added).

It could not be more clear, then, that respondent was advised of his rights to remain silent and to have a lawyer present during any discussions, and that respondent chose—and announced his choice in clear terms—to waive those rights.[1]

*B. The refusal to sign a written statement without an attorney present does not constitute an invocation of the right to remain silent.*

The essential question in this case is whether an invocation of the right to counsel for written but not oral statements must be construed by police as an omnibus invocation of the right to remain silent in any circumstance, even where a suspect spontaneously evinces a willingness to talk freely without an attorney. The great weight of authority answers that question with a resounding "no".

It is important to note at the outset that the court below skirted that question completely, and substituted tautology for analysis. That court cited, without quotation, *Fare v. Michael C.*, 442 U.S. 707, 719 (1979), for the proposition that "[t]he defendant's refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police." 197 Conn. at 57. We suppose that the court below was referring to that portion of the *Fare* opinion claiming that *Miranda v. Arizona*, 384 U.S. 436 (1966), created a "rigid rule

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1 In its opinion, the Connecticut Supreme Court stated that the trial court "impliedly found that the defendant had requested counsel." In a footnote that accompanies that statement, the Connecticut Supreme Court explained that "[t]he trial court noted the defendant's refusal to give a written statement without an attorney during its discussion of the defendant's waiver of his rights." 197 Conn. at 56, n.6. Hence, the "implied finding" of the trial court turns out to be nothing more than the trial court's acknowledgement that respondent refused to give a written statement without an attorney. In fact, the claim that respondent had invoked his right to counsel was first made only on appeal to the Connecticut Supreme Court.

that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogations cease." 442 U.S. at 719. The Connecticut Supreme Court's conclusion, though, scarcely follows from its premise. The fact that a request for an attorney is an invocation of one's Fifth Amendment rights does not mean that the statement that one will not make written statements without an attorney is a request for an attorney as respects oral discussions.

This Court made quite clear, in *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), that the mere refusal to sign a written waiver of *Miranda* rights does not preclude a valid waiver of those rights:

> The question is not one of form, but of whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.

In *North Carolina v. Butler*, this Court endorsed a common sense approach to the waiver question that had theretofore been formulated and applied in a number of cases by a number of federal circuit courts of appeal.[2] As the District of Columbia Circuit noted in *United States v. Cooper*, 499 F.2d 1060 (D.C. Cir. 1974), it is

> a common experience of life that in many circumstances persons are willing to convey information orally but are reluctant to put the same

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2 See, e.g., *United States v. Cooper*, 499 F.2d 1060 (D.C. Cir. 1974); *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (*en banc*); *United States v. McNeil*, 433 F.2d 1109 (D.C. Cir. 1969); *Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970); *Harris v. Riddle*, 551 F.2d 936 (4th Cir.), *cert. denied*, 434 U.S. 849 (1977); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *United States v. Stevens*, 445 F.2d 304 (6th Cir.) (per curiam), *cert. denied*, 404 U.S. 945 (1971); *United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *Klingler v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969).

> thing in writing. We do not think, as *Frazier en banc*, *McNeil*, and *Pettyjohn* have made clear before, that a refusal to sign a waiver means that the person interrogated is assuming a contradictory position with respect to his willingness to respond to oral questions, whatever may be his motive in so doing.

499 F.2d at 1062 (referring to the cases cited in footnote 2 hereof). The relevant inquiry, as *North Carolina v. Butler* and the circuit court cases make clear, is not the narrow one of whether the suspect has refused to sign a waiver or other statement, but rather the broad one of whether under the facts and circumstances presented the suspect has made a valid waiver.

Especially instructive is the *Frazier* case wherein a robbery suspect confessed to a series of other robberies in which he was not a suspect. When the officer listening to the confession reached for a pad and pencil to take notes, the suspect objected: "No, don't put anything down. Don't write anything." 476 F.2d at 893. The officer pushed the pad away, and the suspect continued with his confessions. When the suspect had finished relating what he wanted to tell, the officer suggested that the suspect sign a written version of what he had said. The suspect refused. 476 F.2d at 894. The panel that first heard the case concluded that the suspect's ban on notetaking was tantamount to invocation of the right to counsel, and that no statement, oral or written, made thereafter could be admissible absent an explanation to the suspect by police that the legal rules governing the admissibility of evidence do not distinguish between oral and written confessions. 476 F.2d at 898.

The circuit court sitting *en banc* disagreed. The United States Supreme Court, it said, took care in *Miranda* to spell out precisely the warnings to be given. It is not for a police officer to place a legal interpretation on those warnings; indeed, "[w]e doubt that the warmest friends of *Miranda* wish to see a return to the days when such officers, although not lawyers themselves, were free with legal advice to their prisoners." *Id.* at 898-99. The police had, said the *en banc* court, placed word for word

the warnings suggested by the *Miranda* court on their printed cards, and had read those warnings to the suspect. Those warnings "unmistakably gave notice that what one *says*, as distinct from what one *writes* or *signs*, can and will be used in court . . ." *Id.* at 896 (emphasis in original).

> When the police, as here, faithfully followed the exact procedure prescribed by the Supreme Court, inferior courts should be slow to mandate, after the fact, enlarged responsibilities alien to the duties and training of policemen.

476 F.2d at 899. Finding the other circumstances of the case to be entirely consistent with a valid waiver, the *Frazier en banc* court affirmed the admissibility of the officer's testimony.

While there are no federal cases on point, amicus respectfully submits that, provided a suspect is fully willing to give an oral statement without an attorney, it should not make a whit of difference whether the refusal to give a written statement is made without elaboration, or is softened and qualified by making exception for a circumstance in which an attorney is present.

Notwithstanding the absence of federal cases directly on point, there is a state case on point, decided, in fact, by the Connecticut Supreme Court: *State v. Harris*, 188 Conn. 574, 452 A.2d 634 (1982), *cert. denied*, 460 U.S. 1089 (1983). In that case, a suspect who had refused to sign a written waiver and had refused to make a written statement before consultation with a lawyer, sought to suppress his oral statements to police. The Connecticut Supreme Court, noting that the suspect had expressed to police a willingness to discuss the crime in question, and noting the absence of factors that have traditionally been held to cast doubt on a finding of a knowing and voluntary waiver, concluded that the suspect's oral statements were properly admissible. *State v. Harris, supra*, 452 A.2d at 637. See also *State v. Frazier*, 440 A.2d 916 (Conn. 1981), *cert. denied*, 458 U.S. 1112 (1982) (refusal to sign a written statement in the absence of an attorney did not vitiate an otherwise valid waiver of right to remain silent).

In sum, the holding of the court below is not in any way required by or consistent with any decision of this Court. To the contrary, the holding below is at odds with *North Carolina v. Butler*, *Edwards v. Arizona*, and with established and sensible precedent of a number of federal appeals courts.

*C. Respondent's conduct and statements evidence a voluntary, knowing, and intelligent waiver of the right to remain silent and the right to counsel.*

If any case presents an example of a knowing, voluntary, and intelligent waiver of the right to remain silent and the right to counsel, this case surely is it. Respondent was advised three times of his *Miranda* rights before the first discussions with police, and received an additional set of warnings before his second discussions. The trial court found that respondent "understood perfectly" those rights, and *respondent himself testified that he understood his rights.* Respondent's understanding is confirmed by his refusal to give a written statement without an attorney present and by the fact that he occasionally ignored questions from police during his narratives.[3] Respondent was not without example of a refusal even to talk to police without counsel present; co-assailant Artis, with whom respondent shared

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3 The Connecticut Supreme Court seemed to find something significant about the fact that Lieutenant Howard, who arrived at the police station after the first discussions among respondent and Officers Genovese and Cameron, was under the (mistaken) impression that respondent had called an attorney. Even if relevant, that fact can bear only on the second discussions. The lieutenant's mistaken impression is, however, not relevant. As this Court recently stated in *Moran v. Burbine*, 106 S. Ct. 1135, 1142 (1986), "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." A closer case might be presented if respondent had announced that he had called his attorney, but since respondent did not announce that (because he had not done so), this matter not only is irrelevant but is not even a part of the case.

a cell at the Wallingford police station, exercised his right to remain silent.[4]

The nature of respondent's statements to police is, perhaps, the best evidence of voluntariness of his waivers of the right to remain silent and right to counsel.[5] The record makes clear

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4 This fact is noted on the police report prepared by Sergeant Genovese and admitted as State's Exhibit C for purposes of the suppression hearing. Tr. at 426.

5 Because we expect that respondent or amici filing briefs on respondent's behalf may make much of respondent's claimed injuries, we spell out in detail what those injuries consisted in. Upon arrival at the Wallingford police station, respondent had a cut—variously described as a "gash" (Tr. at 451) and a "scratch" (Tr. at 495)—on one of his hands, and attendant swelling. Respondent also had discoloration associated with bruising under his left eye. Tr. at 489. In Lieutenant Howard's view, respondent's hand was doubtlessly sore, but no pain or serious discomfort on respondent's part was evident. Tr. at 509. The decision to transport respondent to a hospital emergency room was made because of the police's concern about a leg injury to co-assailant Artis, who requested hospitalization. Tr. at 471. Respondent testified that he also had requested medical attention. (Tr. at 865, 868); Lieutenant Howard recalled no such request, and testified that any request would have been honored (Tr. at 506, 509-10). At the hospital, respondent was given a prescription for eye drops. There is no evidence at all in the record that his hand required any medical treatment. Lest the implication arise that the injuries of respondent and Artis may have been caused by police, we note that the record clearly indicates that respondent's hand injury may have been caused by the efforts of the victim to resist efforts to undress her (Tr. at 14, 736), and that the other injuries of respondent and assailant resulted from a barroom brawl in which the angered brothers of the victim attacked her assailants (Tr. at 244, 261, 478, 492-93, 652-53, 713, 728-29, 843-47). Ironically, by arresting the assailants, police plucked them from a potentially lethal brawl (Tr. at 845) and transported them to one of the few places where they could be certain of being safe that evening—the police station.

that the statements were not extracted by lengthy questioning, or insistent badgering, or physical force, or psychological coercion.[6] Rather, those statements were spontaneous narratives by a speaker who was both willing and eager to tell his side of the story, and who in so telling that story sometimes chose to ignore the questions occasionally interjected by his interlocutors.

Manifestly absent from this case are the "salient features" of "incommunicado interrogation of individuals in a police-dominated atmosphere" without "full warnings of constitutional rights" that were "essential" to the decisions in *Miranda*, 384 U.S. at 445. Respondent's phone calls and discussions with the co-assailant (who refused to talk with police)[7] are obvious forms of communication that make respondent's first hours in custody the opposite of "incommunicado". In sum, not only respondent's words, but also his acts and the circumstances surrounding them evince a voluntary, knowing, and intelligent waiver of his right to remain silent and right to counsel, and fully support the ruling of the trial court, which observed firsthand the witnesses to the events in question, that the waiver was validly made.

## II. *EDWARDS V. ARIZONA* AND ITS PROGENY ARE CONSPICUOUS EXAMPLES OF POLICE BADGERING IN THE FACE OF AN ACCUSED'S CLEAR REQUEST FOR COUNSEL, AND THESE CONDITIONS ARE ABSENT IN THIS CASE.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the defendant unequivocally requested an attorney during the first interroga-

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6 Tr. at 454, 491, 600-03.

7 It is clear from the record that respondent and Artis conversed while at the Wallingford police station, if not before the first discussions, certainly before the second. Tr. at 865.

tion, whereupon questioning ceased and he was removed to a jail cell. The next morning, he was told that he "had to" talk to detectives, even though he had stated quite clearly that "he did not want to talk to anyone." 451 U.S. at 479. Thus, *Edwards* presents a clear example of impermissible badgering of a suspect who in clear and unmistakable terms expressed his desire to exercise his Fifth Amendment right against self-incrimination.

As the states of Alaska et al. demonstrate in their amicus brief urging reversal in this case, the focus upon the presence or absence of badgering or coercion by police is a thread that runs through cases decided since *Edwards*, including *Smith v. Illinois*, 105 S. Ct. 490 (1984); *Solem v. Stumes*, 465 U.S. 638 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); and *Wyrick v. Fields*, 459 U.S. 42 (1982). This common theme strikes much closer to the heart of the voluntariness inquiry that has historically been the central concern of Fifth Amendment analysis than does the holding below. There was simply no badgering or overriding of the suspect's decision to remain silent.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Connecticut Supreme Court.

Respectfully submitted,

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